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Supreme Court, U.S.
FILED

No. 03 397 SEP 11 2003

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In the
Supreme Court of the United States

LUANNE MOORE,

Petitioner,

v.

EXXON MOBIL CORPORATION f/k/a
MOBIL OIL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is compelling reason to grant this Petition for Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit and the United States District Court, Eastern Division of Texas has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for this Court's supervisory power. Supreme Court Rule 10(a).

2. Whether Judge Thad Heartfield departed from the usual and accepted course of judicial proceedings as to call for this Court's supervisory power. Judge Heartfield's son, J. Thad Heartfield[1], is counsel of record for Mobil Oil Corporation[2] on at least three Fifth Circuit appeals[3]. The manner in which the decision to grant Respondent's Motion for Summary Judgment raises the question as to whether there was a conflict of interest between Judge Heartfield and Respondent Exxon Mobil. There is compelling reason to grant this Petition for Writ of Certiorari.

3. The Fifth Circuit's determination that it was denying Petitioner's Appeal for the very same reasons stated by the District Judge in his "Memorandum Opinion" on Defendant's Motion for Summary Judgment filed on October 9, 2002. The Fifth Circuit simply rubber-stamped the trial Court's opinion. Neither Court drew reasonable inferences in the non-movant's favor and they specifically did not even address or consider the actual facts of the case as they pertained to Luanne Moore.

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[1] J. Thad Heartfield is a partner in the law firm Heartfield and McGinnis.

[2] Respondent in this matter was formerly known as Mobil Oil Corporation.

[3] J. Thad Heartfield is listed as counsel of record on Case Numbers 99-00087, 00-40001, and 00-40086 in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner is not required to file a corporate disclosure statement. Petitioner/Plaintiff is an individual. Respondent/Defendant Exxon Mobil Corporation *f/k/a* Mobil Oil Corporation is a New Jersey Corporation.

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to hear this case under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et. seq*. Jurisdiction is also proper and timely pursuant to 28 U.S.C. § 2101 (c), Supreme Court Rules 10(a), 12.1, 13.1, 13.3, and 29.

OPINIONS BELOW

Appellant is appealing a Denial of a Petition for Panel Rehearing entered June 13, 2003, by the United States Court of Appeals for the Fifth Circuit and a judgment of the United States Court of Appeals for the Fifth Circuit entered on May 16, 2003.

The United States District Court for the Southern District of Texas entered a final order on October 30, 2002 and a Summary Judgment order on September 30, 2002.

I

STATEMENT OF THE CASE

A. Statutes Involved as the Basis for Federal Jurisdiction in the Court of the First Instance

42 U.S.C. § 2000 *et seq*.

§ 2000e-2 Unlawful Employment Practices

(a) Employer Practices

"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin".

B. Facts Material to the Consideration of the Questions Presented

Summary Judgment was granted for the Defendant and Moore appealed to the Fifth Circuit. The case was ultimately dismissed by an order denying Moore's Petition for Panel Rehearing entered on June 13, 2003.

Judge Thad Heartfield has a conflict of interest with Respondent Exxon Mobil that existed at the time Luanne Moore's lawsuit was pending in his Court. Prior to taking the bench in 1995, Judge Heartfield officed at the same location as his son, L. Thad Heartfield of the firm Heartfield and McGinnis. J. Thad Heartfield currently maintains the law firm Heartfield and McGinnis and is counsel of record for Respondent, Mobil, on at least three Fifth Circuit appeals.[4] It appears that Mobil was the client of Judge Heartfield's son at the very same time that Luanne Moore's case was pending in his Court.

Judge Heartfield wholly failed to recuse himself from Moore's case and did not disclose the conflict he had with Respondent Exxon Mobil. The manner in which Judge Heartfield made the decision to grant Respondent's Motion for Summary Judgment supports the issue whether there was

[4] J. Thad Heartfield is listed as counsel of record on Case Numbers 99-00087, 00-40001, and 00-40086 in the Fifth Circuit.

a conflict of interest between Judge Heartfield and Respondent Exxon Mobil. Additionally, Judge Heartfield has had four civil cases filed against him since he was appointed to the bench.[5] Moore did not raise this issue prior because she only recently discovered Judge Heartfield's conflict of interest in June 2003. When Moore requested Judge Heartfield's Financial Disclosure Reports for 2000, 2001, and 2002, she found that his information on Investments and Trusts had been redacted as, "personal and sensitive information that is otherwise confidential and could endanger the officer or other person if obtained by any member of the public hostile to the judicial officer." It is important to note that based on Moore's complaints, the Fifth Circuit Court of Appeals is currently investing Judge Heartfield's conflict of interest in this case and attempting to locate his Financial Disclosure Reports for 2000, 2001, and 2002.

This case was set for trial twice after Respondent filed its Motion for Summary Judgment. Respondent filed its Motion for Summary Judgment on November 29, 2001. Initially, the instant suit was set for trial the beginning February 20, 2002. Both parties completed and filed their Joint Pretrial Order and announced ready for trial. The case was not reached on the Court's docket, but was reset for May 20, 2002. Again, Moore prepared for trial only to have the instant case not reached. Nonetheless, after this case was not reached for trial the second time, the District Court then granted Respondent's Motion for Summary Judgment on September 30, 2002, more than 10 months after it was initially filed and after two trial settings.

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[5] These cases are 1:97-CV-398, 1:97-CV-478, 1:00-CV-99, and 5:03-CV-23.

II

SUMMARY OF THE ARGUMENT

There are compelling reasons why this Court should grant this Petition for Writ of Certiorari and consider these important questions.

Specifically, whether the Trial Court Judge, Thad Heartfield, has so far departed from the usual and accepted course of judicial proceedings or sanctioned such a departure by a lower court as to call for this Court's supervisory power. Judge Heartfield has a conflict of interest with Respondent Exxon Mobil that existed at the time Luanne Moore's lawsuit was pending in his Court. Prior to taking the bench in 1995, Judge Heartfield office at the same location as his son, J. Thad Heartfield. J. Thad Heartfield still runs the law firm Heartfield and McGinnis and is counsel of record for Respondent, Mobil, on at least three Fifth Circuit appeals.[6] It appears that Mobil was the client of Judge Heartfield's son at the very same time that Luanne Moore's case was pending in his Court.

[6] J. Thad Heartfield is listed as counsel of record on Case Numbers 99-00087, 00-40001, and 00-40086 in the Fifth Circuit.

III

REASONS FOR GRANTING WRIT

A. Luanne Moore Has Brought a Compelling Reason why this Honorable Court should Grant her Petition for Writ of Certiorari.

Any Judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. § 455(a). A judge must also disqualify himself where he has a personal bias or prejudice concerning a party. 28 U.S.C. § 455(b)(1). Courts have repeatedly expressed the importance of an impartial judiciary: "[o]ne of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case." *United States v. Wade,* 931 F.2d 300, 304 (5th Cir.) (quoting *United States v. Brown,* 539 F.2d 467, 469 (5th Cir.1976)), *cert. denied,* 502 U.S. 888, 112 S.Ct. 247, 116 L.Ed.2d 202 (1991). This Honorable Court described the standard as whether a reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's impartiality. *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 860-61, 108 S.Ct. 2194, 2203, 100 L.Ed.2d 855 (1988), "The goal of section 455(a) is to avoid even the appearance of partiality." *Id.*

Judge Heartfield's impartiality is reasonably questioned in a case such as this where his son and former law firm represent the Respondent in several proceedings. He also had a personal bias or prejudice towards Respondent, which he should have disclosed to Moore while he presided over her case. A reasonable and impartial person would certainly

question Judge Heartfield's impartiality, particularly given the facts of this case.

Judge Heartfield wholly failed to recuse himself from Moore's case, nor did he disclose the conflict he had with Respondent Exxon Mobil. At the very least, Judge Heartfield was required to disclose the relationship of his son to Exxon to the Parties. The manner in which Judge Heartfield made the decision to grant Respondent's Motion for Summary Judgment raises the question as to whether there was a conflict of interest between Judge Heartfield and Respondent Exxon Mobil. Additionally, Judge Heartfield has had four civil cases filed against him since he was appointed to the bench.[7] Moore did not raise this issue prior because she only recently discovered Judge Heartfield's conflict of interest in June 2003. When Moore requested Judge Heartfield's Financial Disclosure Reports for 2000, 2001, and 2002, she found that his information on Investments and Trusts had been redacted as, "personal and sensitive information that is otherwise confidential and could endanger the officer or other person if obtained by any member of the public hostile to the judicial officer."[8] There is compelling reason to grant this Petition for Writ of Certiorari.

Moreover, Moore further asserts that in evaluating the summary judgment standard, the District Court inappropriately weighed the evidence in favor of Exxon Mobil. In effect, the District Court assumed there was fact

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[7] These cases are 1:97-CV-398, 1:97-CV-478, 1:00-CV-99, and 5:03-CV-23.

[8] It is important to note that the Fifth Circuit Court of Appeals is currently investing Judge Heartfield's conflict of interest in this case and attempting to locate his Financial Disclosure Reports for 2000, 2001, and 2002.

issues present and went on to assume the role of fact finder. The District Court granted summary judgment on its own factual determinations, which are best left to the proper fact finder, the jury.

Therefore, despite the existence of Moore's *prima facie* case, the District Court denied Moore her right to a jury trial. The United States Court of Appeals for the Fifth Circuit went on to affirm that ruling by simply rubber stamping the District Court's Order.

IV

CONCLUSION

Luanne Moore has shown this Court that the United States Court of Appeals for the Fifth Circuit and the United States District Court, Eastern Division of Texas has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for this Court's supervisory power and that compelling reasons exist to grant her Petition for Writ of Certiorari. Luanne Moore has met her *prima facie* case of discrimination and retaliation and offered evidence to rebut the "legitimate" business reason offered by Exxon Mobil for its actions toward Luanne Moore. Luanne Moore respectfully requests that her Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41654

[Filed June 13, 2003]

LUANNE MOORE,
Plaintiff-Appellant,
v.
ExxonMobil OIL CORPORATION,
a New Jersey Corporation,
formerly known as Mobil Oil Corporation,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas, Beaumont
(1: 00-CV- 839)

ON PETITION FOR REHEARING

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

IT IS ORDERED that the petition for rehearing is **DENIED.**

ENTERED FOR THE COURT:
/s/
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41654

[Filed May 16, 2003]

LUANNE MOORE,
Plaintiff-Appellant,
v.
ExxonMobil OIL CORPORATION,
a New Jersey Corporation,
formerly known as Mobil Oil Corporation,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas, Beaumont
(1: 00-CV- 839)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Luanne Moore ("Moore") filed suit in the federal district

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

court against ExxonMobil Oil Corporation ("ExxonMobil") alleging violations of Title VII as well as a claim for intentional infliction of emotional distress under state law. ExxonMobil answered indicating that Moore was terminated because of "serious performance deficiencies" and that Moore had been placed on "a performance improvement plan" but failed to achieve the necessary improvement in performance. ExxonMobil moved for summary judgment which was granted and Moore appeals to this Court.

We have carefully reviewed the briefs, the record excerpts and relevant portions of the record itself. For the reasons stated by the district judge in his "Memorandum Opinion on Defendant's Motion for Summary Judgment" filed October 9, 2002, we affirm the final judgment of the district court granting defendant's motion for summary judgment. AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41654

[Filed May 16, 2003]

LUANNE MOORE,	)
Plaintiff-Appellant,	)
v.	)
ExxonMobil OIL CORPORATION,	)
a New Jersey Corporation,	)
formerly known as Mobil Oil Corporation,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
For the Eastern District of Texas, Beaumont
(1: 00-CV- 839)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE : June 23, 2003

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 1:00CV839 (TH)

[Filed October 9, 2002]

LUANNE MOORE, *Plaintiff,*
v.
ExxonMobil CORPORATION, *Defendant.*

MEMORANDUM OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court *is Defendant ExxonMobil Oil Corporation's Motion for Summary Judgment* [Clerk's Docket No. 14] filed November 29, 2001. Having considered the motion, response and reply, the Court is of the opinion that the motion should be granted.

FACTUAL & PROCEDURAL BACKGROUND

This litigation arises out of an employment dispute. Plaintiff Luanne Moore was formerly employed as a senior engineer at ExxonMobil's plant in Beaumont, Texas. In

November 1999, plaintiff was terminated. Plaintiff generally contends that termination was the result of discriminatory animus based upon her gender; ExxonMobil submits that she was terminated due to poor job performance.

On March 15, 2000, Ms. Moore filed a formal charge of discrimination against ExxonMobil with the E.E.O.C.[1] In the charge, plaintiff complained of discrimination and retaliation based on gender; she did not complain of any sexual harassing conduct. After investigating her complaint, the E.E.O.C. was unable to conclude that ExxonMobil violated Title VII and dismissed the charge of discrimination on September 13, 2000. On that same day, the E.E.O.C. issued a right-to-sue letter.

On December 7, 2000, plaintiff filed suit in this Court alleging that ExxonMobil discriminated against her in violation of federal and state law. Plaintiff brought federal claims for violation of Title VII (gender discrimination, retaliation, and sexual harassment) and a supplemental state law claim for intentional infliction of emotional distress.

On November 29, 2001, ExxonMobil filed a motion for summary judgment seeking dismissal of plaintiff's complaint in its entirety. ExxonMobil contends plaintiff was terminated for poor job performance. In support of this position, ExxonMobil points to Ms. Moore's 1998 *Annual Performance Summary* dated March 15, 1999, which cites the following deficiencies with respect to Ms. Moore's job performance: she refused assignments, provided minimal documentation of

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[1] Prior to filing the formal charge of discrimination, Ms. Moore made several internal complaints of discrimination. Since 1993, she has accused six of her ExxonMobil supervisors of discriminating against her based upon her gender.

her work, contributed little to projects, did not demonstrate appropriate concerns for safety, repeatedly missed deadlines to complete training, had to be escorted by her supervisor to training, inadequately documented her work and made no contribution to group reports. Her job performance was characterized as below expectations. The *Annual Performance Summary* recommended that Ms. Moore develop team leadership skills, assist in mentoring and develop her computer skills.

Based on this review, Bob Hagerty, her direct supervisor, and Dick Townsend, the plant manager and her second line supervisor, developed *Guidelines for Improved Job Performance* dated March 30, 1999. This was the third time Ms. Moore was placed on a performance improvement plan. This document advised Ms. Moore that:

> your work performance has not met our expectations for a Salary Grade 15 engineer at Mobil Chemical. Previously, you have demonstrated similar substandard performance. Your performance history shows poor behavior patterns around communication/interaction with your team and other teams on projects, meeting commitments on projects, response to supervisor requests, proactive resolution of problems, and participation in meetings and training. Those poor behavior patterns have surfaced again and must be significantly improved.

The document went on to identify several specific objectives designed to improve her job performance. Plaintiff was advised that she would be subject to disciplinary action, including termination, if her performance did not improve within three months.

Following the evaluation, Ms. Moore made a written request for a human resources representative to attend her weekly project meeting with her supervisor Mr. Hagerty. She stated that "given his past problems and displays of anger, I simply do not feel comfortable being alone with him." She further stated that she did not agree with the recommendations for improved job performance.

Ms. Moore's performance was reviewed by Mr. Hagerty again in July and September 1999. She was advised that she had not met all of the short term objectives established in the *Guidelines for Improved Job Performance*. Even so, Ms. Moore was not terminated at that time. Rather, several expectations critical to the continuation of her employment with ExxonMobil were set forth in an *Appraisal of Work Performance* dated September 8, 1999. She was again advised that she would be terminated if her performance did not improve.

Ms. Moore secretly taped her September 1999 meeting with Mr. Hagerty. She then transcribed a portion of the conversation and electronically mailed the contents thereof to the human resources department and the plant manager. Specifically, she complained that he acted unprofessionally and threatened her job.

During the week of September 27, 1999, Ms. Moore made allegations that Mark Bartilucci was non-inclusive and did not value her ideas when he did not adopt a work related recommendation she proposed.

ExxonMobil contends that Ms. Moore's performance continued to decline, and on November 12, 1999, plaintiff was terminated.

LEGAL STANDARD - MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett, 477* U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Summary judgment procedures empower the court to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). The purpose of summary judgment proceedings is to dispose of factually and legally unsupported claims and defenses while protecting parties' respective rights to trial on disputed issues. *Celotex Corp.*, 477 U.S. at 323-24, 106 S. Ct. at 2553. Disposition by summary judgment is not a "disfavored procedural short-cut, but rather, an integral part of the FEDERAL RULES as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of an action.'" *Celotex Corp.*, 477 U.S. at 327, 106 S. Ct. at 2555 (quoting FED. R. CIV. P. 1).

As an initial matter, the burden is on the party seeking summary judgment to demonstrate that there is no genuine issue as to any material fact.[2] *Adickes v. S.H. Kress & Co.*,

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[2] For purposes of summary judgment, an issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict in favor of the nonmovant; a fact is "material" if its resolution under substantive law in favor of one party might affect the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970). In so doing, the movant need not negate the elements of the non-movant's case, but rather, may establish that there is insufficient evidence to support an essential element of the plaintiff's claim.

The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita,* 475 U.S. at 585-87, 106 S. Ct. at 1356. To carry this burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts," but instead, "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting FED. R. CIV. P. 56 (e)). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law preclude entry of summary judgment. *Anderson,* 477 U.S. at 247-48, 106 S. Ct. at 2509-10.

When considering motions for summary judgment, courts must resolve all reasonable doubts in favor of the nonmoving party. *General Elec. Co. v. Joiner,* 522 U.S. 136, 143, 118 S. Ct. 512, 517 (1997). "[T]he nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie,* 526 U.S. 541,552, 119 S. Ct. 1545, 1551-52 (1999). "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions.'" *Id.*

Evidence may be considered on a Rule 56 motion to the extent that it is not based on hearsay or otherwise excludable at trial. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987).

In light of this procedural framework, the Court now considers the merits of the motion for summary judgment.

ANALYSIS

A. Discrimination in Violation of Title VII

As an initial matter, the Court notes that employment discrimination laws are intended neither to "be a vehicle for judicial second guessing of employment decisions nor .... to transform the courts into personnel managers." *E.E.O.C.v. Louisiana Office of Cmty. Servs.*, 47 F.3d 1438, 1448 (5th Cir. 1995). "Federal courts 'do not sit as a super-personnel departments that re-examines an entity's business decisions....'" *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (1 lth Cir. 1991). It has long been the law in the Fifth Circuit that Title VII does not protect against unfair or unwise business decisions, but rather, only against decisions motivated by unlawful animus. *Nieto v. L&HPacking Co.*, 108 F.3d 621, 624 (5th Cir. 1997).

1. Gender Discrimination

Title VII prohibits employers from, among other things, "discriminat[ing] against any individual with respect to [the] compensation, terms, conditions or privileges of employment, because of such individual's... sex." 42 U.S.C. § 2000e-2(a)(1). Under Title VII, "[a] plaintiff can prove discriminatory animus by direct evidence or by an indirect inferential method of proof." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995).

Because Ms. Moore relies on indirect evidence of discrimination, her gender discrimination claim must be

evaluated within the so-called *McDonnell Douglas* analytical framework. *Evans v. City of Houston,* 246 F.3d 344, 349 (5th Cir. 2001). She must first come forward with a prima facie case of gender discrimination, which once established, creates a rebuttable inference of discrimination. *Id.* at 350. Here, plaintiff has established that she is a member of a protected class; that she was qualified for the position; that she was discharged; and that she was replaced by a person who is not a member of the protected class. Having come forward with a prima facie case of gender discrimination, the plaintiff has created a rebuttable presumption of discrimination.

Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce a legitimate, nondiscriminatory justification for the employment action. *Id.* "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000). This burden is met by offering admissible evidence sufficient for the trier of fact to conclude that unlawful discrimination was not the cause of the employment action. *Id.; Bauer v. Albemarle Corp.,* 169 F.3d 962, 966 (5th Cir. 1999). ExxonMobil met this burden by coming forward with competent, admissible evidence that plaintiff was terminated for contemporaneously documented poor job performance.[3]

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[3] ExxonMobil cites: the 1998 *Annual Performance Summary* indicating that Ms. Moore's performance was below expectations; her failure to comply with the short-term objectives for improvement set forth in the *Guidelines for Improved Job Performance;* and her failure to meet the expectations identified in the *Appraisal of Work Performance.* ExxonMobil also relies on the testimony of Mr. Hagerty that he orally reprimanded Ms. Moore approximately six times in 1998 in connection with her job, which

"If the defendant can articulate a reason that, if believed, would support a finding that the action was nondiscriminatory, the mandatory inference of discrimination created by the plaintiff's prima facie case drops out of the picture and the factfinder must decide the ultimate question: whether [the] plaintiff has proved [intentional discrimination].'" *Evans,* 246 F.3d at 350. "Although intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves,* 530 U.S. at 143, 120 S. Ct. at 2106. To carry this burden, "'the plaintiff can rely on evidence that the employer's reasons were a pretext for unlawful discrimination' and the factfinder 'may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom.'" *Evans,* 246 F.3d at 350.

With respect to the issue of pretext, "'[m]erely disputing [an employer's] assessment of [a plaintiff's] work performance will not necessarily support an inference of pretext.'" *Id.* at 355. Thus, a plaintiff "cannot survive

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he then contemporaneously documented. There is also evidence before the Court that the decision to terminate Ms. Moore was made by Mr. Townsend, the plant manager, based upon her poor performance. ExxonMobil also submits evidence that the human resources department was independently aware of problems with Ms. Moore's job performance in 1998. Finally, there was evidence of Ms. Moore's continued inability to work as a team member based upon her request for a human resources representative to attend her weekly project meetings with her supervisor, the secret taping of the conversation with her supervisor and the dispute with Mr. Bartilucci that arose when he failed to adopt her project recommendation.

summary judgment merely because she disagrees with [her employer's] characterization of her disciplinary history; rather, '[t]he issue is whether [the employer's] perception of [the plaintiff's] performance, accurate or not, was the real reason for her termination.'" *Id.* Moreover, "[p]roof that 'the employer's proffered reason is unpersuasive, or even contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.'" *Reeves,* 530 U.S. at 146-47, 120 S. Ct. at 2108. "In other words, '[i]t is not enough... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.'" *Id.*

"An employer would be entitled to judgment as a matter of law if the record conclusively revealed some other nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves,* 530 U.S. at 148, 120 S. Ct. at 2108.

"Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors." *Id.* "Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 149.

Ms. Moore has not come forward with sufficient evidence that the explanation offered by ExxonMobil for Ms. Moore's termination was pretextual for gender discrimination. She merely disputes the job performance evaluation and cites a personality conflict with her supervisor-neither of which supports of an inference of pretext. The overwhelming weight of the evidence before the Court compels the conclusion that

ExxonMobil's perception of plaintiff's job performance-and not gender discrimination-was the reason for her termination. As such, plaintiff has not demonstrated the existence of a genuine issue for trial.

It is for these reasons that defendant's motion for summary judgment on plaintiff's claim for gender discrimination must be granted.

2. Retaliation Claim

Plaintiff claims that she was terminated in retaliation for filing an internal complaint of discrimination to the human resources department.

The *McDonnell Douglas* shifting burden analytical framework also applies to retaliation claims. *Evans,* 246 F.3d at 351. To establish a prima facie case of retaliation under Title VII, Ms. Moore must demonstrate that: (1) she engaged in an activity protected by the statute; (2) she experienced an adverse employment action following the protected activity; and (3) a causal link between the protected activity and the adverse employment action. *Id.* at 351-52. Having made this showing, there is a rebuttable presumption that Ms. Moore was fired in retaliation for engaging in a protected activity.

In response, ExxonMobil came forward with evidence that plaintiff was terminated for poor job performance, discussed *supra,* and not because she complained of any discrimination in violation of Title VII. As such, the inference of discrimination disappears and the burden is on the plaintiff to prove discrimination vel non. *Reeves,* 530 U.S. at 142-43, 120 S. Ct. 2097, 2106.

The question then becomes whether ExxonMobil

unlawfully retaliated against Ms. Moore. *Evans,* 246 F.3d at 354. In this context, the issue for the factfinder is whether plaintiff can prove that termination would not have occurred "but for" her complaint of discrimination. *Id.* She may demonstrate this by showing that the proffered reason for termination was pretextual. *Id.* at 355. This Ms. Moore has not done, because she has not come forward with competent summary judgment evidence that the explanation offered by ExxonMobil for her termination was pretextual. It is not lost on the Court that if ExxonMobil were inclined to retaliate against Ms. Moore for making an accusation of discrimination, it had ample opportunity to do so prior to 1999, given that she lodged six complaints of discrimination against various supervisors beginning in 1993. Moreover, there is ample documentation reciting the deficiencies in Ms. Moore's job performance which support the conclusion that she was terminated as a result thereof. Viewing the evidence in its entirety, the Court concludes that the plaintiff has not come forward with sufficient evidence to create a fact question with respect to her retaliation claim.

It is for this reason that the Court grants summary judgment on plaintiff's retaliation claim.

3. Sexual Harassment Claim

Sexual harassment is a form of sexual discrimination within the contemplated meaning of Title VII. *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 118 S. Ct. 998 (1998). Title VII is not, however, a "general civility code for the American workplace." *Id.* Title VII seeks to prohibit *discrimination* because of sex. *Id.* Discrimination manifests in the form of sexual harassment where there is evidence of intimidating, demeaning or humiliating conduct. *Alvey v. Rayovac Corp.,* 922 F. Supp. 1315, 1329 (W.D. Wis. 1996).

Title VII was not designed to purge the workplace of "vulgarity, bad manners or boorishness." *Id.* Nor was it meant to prevent consensual sexual relations. *Id.* at 1330.

There are two cognizable theories of sexual harassment under Title VII: quid pro quo and hostile work environment. *Lenihan v. Boeing* Co., 994 F. Supp. 776 (S.D. Tex. 1998). The United States Supreme Court had occasion to consider the distinctions between quid pro quo and hostile work environment claims in *Burlington Indus. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257, 2264-65 (1998). The Court noted that the terms are of limited utility in that they do little more than demarcate between cases in which threats are carried out-quid pro quo harassment-and cases in which threats are not carried out or are absent altogether-hostile work environment. When a plaintiff seeks recovery on the basis of hostile work environment, she must make an additional showing that the harassing environment was severe or pervasive. *Id.*

It is unclear which theory of sexual harassment of which plaintiff complains based upon the facts alleged. But for the purpose of these summary judgment proceedings, it is of no moment. This is so because plaintiff failed to bring before the E.E.O.C. facts supporting a claim for sexual harassment under either theory of recovery, and as such, the sexual harassment claim is barred.

As a condition precedent to filing suit under Title VII in Texas, an aggrieved employee must file a charge of discrimination within 300 days of the alleged unlawful employment practice. The purpose of the charge filing requirement is to effect Title VII's goal of conciliatory resolution of the dispute by way of an independent administrative investigation and review. *Price v. Southwestern Bell,* 687 F.2d 74, 78 (5th Cir. 1982). Where the E.E.O.C.

is unable to determine that the alleged conduct establishes a violation of the statute, the E.E.O.C. dismisses the complaint and issues a right to sue letter. The employee can then file suit.

Plaintiff had 300 days from the date of the alleged harassment to file a timely charge of discrimination complaining of any conduct she contends is harassing in nature. Plaintiff's complaint to the E.E.O.C. contains no allegations of sexual harassment, but rather, is limited to allegations of gender discrimination. The factual predicate for the sexual harassment claim cannot be inferred from the gender discrimination allegations contained in the E.E.O.C. charge. Since plaintiff failed to timely file a charge of sexual harassment, she did not exhaust her administrative remedies with respect to those claims, and therefore, cannot maintain suit thereon. The purpose of the exhaustion requirement is defeated where a complainant can litigate a claim not presented to and investigated by the E.E.O.C. Because the E.E.O.C. did not have the opportunity to consider the merits of such a claim, this Court cannot consider it now. The Court notes that plaintiff did not address in her response this ground for summary judgment urged by defendant.

In the alternative, plaintiff has not come forward with evidence of either a threat amounting to quid pro quo harassment or severe or pervasive conduct creating a hostile work environment.

It is for these reasons that plaintiff's Title VII sexual harassment claim must be dismissed.

B. Intentional Infliction of Emotional Distress

Plaintiff also alleged a supplemental cause of action under

Texas law for intentional infliction of emotional distress. This claim also warrants dismissal because plaintiff has not come forward with evidence of extreme and outrageous conduct.

To state a cause of action for intentional infliction of emotional distress under Texas law, plaintiff must show that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Mattiz-Hill v. Reck,* 923 S.W.2d 596, 597 (Tex. 1996); *Twyman v. Twyman,* 855 S.W.2d 619, 621 (Tex. 1993).

Whether a defendant's conduct may be regarded as so extreme and outrageous as to permit recovery is a question of law for the Court to decide as an initial matter. *Wornick Co. v. Casas,* 856 S.W.2d 732,734 (Tex. 1993). As the Texas Supreme Court has made clear, liability only lies where the conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Twyman,* 855 S.W.2d at 621 (quoting Restatement (Second) of Torts § 46 cmt. D (1965)). This tort contemplates recovery for conduct "so unjustifiable, so uncivilized, so based on malice, or so senselessly destructive of another that it rises to the level of 'outrageous conduct.'" *MacArthur v. University of Tex. Health Ctr. at Tyler,* 45 F.3d 890, 899 (5th Cir. 1995). Generally, the case in which outrageous conduct is found is one in which recitation of the facts to the average member of the community would arouse his resentment against the actor and lead him to exclaim "Outrageous!" *Kipp v. LTV Aerospace & Defense,* 838 F. Supp. 298 (N.D. Tex. 1993) (*quoting Horton v. Montgomery Ward& Co.,* 827 S.W.2d 361,369 (Tex. App.- San Antonio, writ denied)). The tort does not, however, protect against

mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. *Johnson v. Merrell Dow Pharm., Inc.*, 965 F.2d 31, 33 (5th Cir. 1992).

Courts have repeatedly held that a claim for intentional infliction of emotional distress does not lie for ordinary employment disputes. *Id.* "The range of behavior covered in 'employment disputes' is quite broad." *Id.* This is so because "in order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees," which can be at times unpleasant for employees. *Id.* at 34. It is well settled that termination alone is insufficient to constitute extreme and outrageous conduct by an employer. *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 254 (Tex. App.- Houston [1st Dist.] 1993, writ denied).

The following facts do not amount to extreme and outrageous conduct under Texas law:

> Calling an employee a racial slur and telling him that he should perform manual labor because of his national origin. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th. Cir. 1993).
>
> Failing to accommodate an employee's disability, mocking his speech problems and making callous remarks about his condition to his wife. *Williams v. E.I duPont de Nemours & Co.*, 955 F. Supp. 711 (S.D. Tex. 1996).

Statement to the effect that an employee had a drug problem. *Kipp v. LTV Aerospace & Defense,* 838 F. Supp. 289 (N.D. Tex. 1993).

Requiring employee to release mental health records to her employer following a suicide attempt before she could be reinstated to regular duty. *Thompson v. City of Arlington,* Tex., 838 F. Supp. 1137 (N.D. Tex. 1993).

In contrast, the following situations are ones in which the conduct was deemed so extreme and outrageous as to support a claim for intentional infliction of emotional distress under Texas law:

The surreptitious videotaping of a sexual encounter and subsequent publication of the videotape. *Boyles v. Kerr,* 855 S.W.2d 593 (Tex. 1993).

A husband's repeated attempt to force his wife to participate in sadomasochistic sexual activities, knowing that she had been raped at knifepoint. *Twyman v. Twyman,* 855 S.W.2d 619 (Tex. 1993).

Terminating an employee for her refusal to falsify financial statements, an illegal act. *Higginbotham v. Allwaste, Inc.,* 889 S.W.2d 411 (Tex. App.- Houston [14th Dist.] 1994, writ denied).

Planting missing checks in an employee's desk and purse in attempt to make her appear to be a thief. *Dean v. Ford Motor Credit Co.,* 885 F.2d 300 (5th Cir. 1989).

As a matter of law, it cannot be said that the conduct alleged in the complaint comports with Texas law's construction of "extreme and outrageous." Recovery for intentional infliction of emotional distress in the employment context is actionable only in limited circumstances. The facts alleged by plaintiff do not fall within the limited scope of this tort. As such, summary judgment in favor of defendant on plaintiff's claim for intentional infliction of emotional distress must be granted.

CONCLUSION

ExxonMobil has demonstrated that it is entitled to judgment as a matter of law because there is no genuine issue as to any material fact. As such, the Court concludes defendant ExxonMobil's motion for summary judgment is meritorious and should be granted.

SIGNED this the 9th day of October, 2002.

/s/_____
Thad Heartfield
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 1:00CV839 (TH)

[Filed September 30, 2002]

LUANNE MOORE,	)
Plaintiff,	)
v.	)
ExxonMobil CORPORATION,	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PENDING MOTIONS AS MOOT

Before the Court is *Defendant ExxonMobil Oil Corporation's Motion for Summary Judgment* [Clerk's Docket No. 14] filed November 29, 2002. Having considered the motion, response and reply, and for the reasons stated in the memorandum opinion to be entered, the Court is of the opinion that the motion should be granted.

IT IS ORDERED that *Defendant ExxonMobil Oil Corporation's Motion for Summary Judgment* [Clerk's Docket No. 14] is in all things **GRANTED**.

IT IS FURTHER ORDERED that plaintiff's complaint is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that all pending motions [Clerk's Docket Nos. 23, 26] are **DENIED AS MOOT**.

SO ORDERED.

SIGNED this the 30th day of September, 2002.

/s/_____
Thad Heartfield
United States District Judge